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No. 83-1963

In the Supreme Court of the United States

OCTOBER TERM, 1984

BARRETT TOAN, ETC., ET AL., PETITIONERS

v.

LUCINDA CUNNINGHAM, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. a. Respondents are a class of minor parents residing in Missouri who have applied for Aid to Families with Dependent Children (AFDC) on behalf of themselves and their children. Respondents also receive Old Age, Survivors and Disability Insurance (OASDI) benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, through representative payees. Pet. App. 18. A representative payee is an individual selected pursuant to statute[1] to receive

[1] 42 U.S.C. 405(j) provides:

> When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

benefits on behalf of a beneficiary who the Secretary of Health and Human Services (the Secretary) determines "is not able to manage or direct the management of benefit payments in his or her interest." 20 C.F.R. 404.2001.

In determining the amount of the AFDC grant to a member of the class or her child, the State included the OASDI benefits as income available to the assistance unit consisting of the minor parent and her child. This had the effect of reducing the amount of the AFDC grant, which is determined by reference to the difference between the applicant's income and the applicable standard of need. Pet. App. 19, 21-23. In the case of the named representative of the respondent class, Lucinda Cunningham, the AFDC payment was approximately $80 per month less than it would have been had the OASDI benefits not been deemed available to her child (*id.* at 33).

b. Following a state administrative decision upholding the computation of her benefits, Cunningham brought this class action in the United States District Court for the Western District of Missouri against petitioners, officials of the Missouri Department of Social Services and Division of Family Services. She sought declaratory and injunctive relief, alleging that the State's deeming policy conflicted with federal regulations and violated the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 20. Although respondents conceded that OASDI benefits could properly be included in the AFDC calculation of income if they were received directly by the beneficiary, respondents argued that the benefits could not be deemed available to the child where payment was made through a representative payee.

The district court concluded that the State's policy violated federal regulations relating to the calculation of available income for purposes of AFDC and to the disposition of

funds paid to a representative payee (Pet. App. 32-41).[2] The court enjoined petitioners "from counting [respondents'] Social Security benefits paid to a representative payee as available income to [respondents'] dependent children when determining AFDC eligibility and grant amount, except to the extent that those Social Security benefits are actually applied to the needs * * * of the dependent child" (*id.* at 41).

c. The court of appeals affirmed (Pet. App. 17-30). The court concluded that the State's policy was in conflict with the federal regulations (see note 2, *supra*), reasoning that it created "an irrebuttable presumption that the representative payee will make available the OASDI payments for the support of the beneficiary's child" and that such a presumption "is contrary to the representative payee's legal obligation to the beneficiary and unlawfully restricts the discretion of the representative payee in applying the benefits" (*id.* at 24-25). Although the Secretary had submitted an amicus curiae brief in support of the State's position,[3] the court

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[2]The AFDC regulations, 45 C.F.R. 233.20(a)(3)(ii)(D) and 233.20(a)(3)(vi), provide that "income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance" and that in "family groups living together, * * * income of a parent is considered available for children under 21."

The representative payee regulations, 20 C.F.R. 404.2035(a) and 404.2040(c), provide that a representative payee must "[u]se the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines * * * to be in the best interests of the beneficiary," and that "[i]f the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support of the beneficiary's legally dependent * * * child."

[3]The Secretary argued that the relevant statutory and regulatory provisions required that all OASDI benefits paid on behalf of a parent be considered in determining any grant to the parent's dependent child. See note 2, *supra;* 42 U.S.C. 602(a)(3). Under these provisions, where the beneficiary's needs were judged to have been met by Missouri under

declined to follow her interpretation of the regulations (*id.* at 28-30). Neither court reached respondents' constitutional claim.

2. The issue presented in this case was recently addressed by Congress in Section 2640(a) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1145.[4] Section 2640(a) provides that, in making the determination of need for a dependent child, a state shall include "any income of or available for" a parent living in the same home as the child, notwithstanding the representative payee provisions of 42 U.S.C. 405(j) (see note 1, *supra*). Missouri's policy of deeming OASDI benefits paid to a representative payee available to the beneficiary's dependent child is now plainly consistent with, and indeed required by, federal law.

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its AFDC program, the State properly deemed the OASDI benefits income available to the AFDC household. See generally *Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981).

[4]Section 2640(a) of the Deficit Reduction Act of 1984 amends Section 402(a) of the Social Security Act (42 U.S.C. 602), by adding, among other things, the following requirement for state AFDC plans:

> (38) * * * [I]n making the determination [of need] under paragraph (7) with respect to a dependent child and applying paragraph (8) [with respect to the disregard of certain income], the State agency shall (except as otherwise provided in this part) include [in the assistance unit] —
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child * * * if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j) [42 U.S.C. 405(j)], in the case of benefits provided under title II) * * *.

See also 49 Fed. Reg. 35586, 35588-35589 (1984).

Although we believe that the court of appeals erred in its interpretation of prior law, its decision is of no prospective importance and accordingly does not merit review by this Court. The court of appeals' judgment, however, which affirmed an injunction contrary to federal law as it now stands,[5] should be vacated. See *Heckler* v. *Turner,* No. 83-1097 (Aug. 10, 1984) (Rehnquist, Circuit Justice). The lower courts may then proceed to consider respondents' constitutional claim, which has not yet been addressed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.* .

REX E. LEE
Solicitor General

DECEMBER 1984

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[5]The changes made by Section 2640(a) of the Deficit Reduction Act of 1984 became effective October 1, 1984. See Section 2646 of the Act, 98 Stat. 1147.